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11 UNITED STATES DISTRICT COURT  
12 SOUTHERN DISTRICT OF CALIFORNIA

13 {Magistrate Jan M. Adler)

14 UNITED STATES OF AMERICA, ) CASE NO. 07CR3405  
15 Plaintiff, ) 07MJ8976  
16 vs. )  
17 Mario Raymond Fernandez (1), ) MEMORANDUM OF POINTS AND  
Ernesto Flores-Blanco (2), ) AUTHORITIES IN SUPPORT OF  
Defendants. ) VIDEOTAPE DEPOSITION AND  
SUBSEQUENT VOLUNTARY DEPORTATION  
OF MATERIAL WITNESSES  
DATE: April 22, 2008  
TIME: 10:30 a.m.  
PLACE: Courtroom of Magistrate  
Jan M. Adler

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19 BY STATUTE AND CASE LAW,

20 THE MOTION SHOULD BE GRANTED

21 According to 18 U.S.C. 3144, "no material witness may be  
22 detained because of inability to comply with any condition of  
23 release if the testimony of such witness can be adequately secured  
24 by deposition and if further detention is not necessary to prevent  
25 a failure of justice".

26 Furthermore, Fed R. Crim P. 15(a) specifies that a material  
27 witness may make a motion requesting such a deposition and the  
28 district court has the authority to order the taking of the

1 deposition and thereafter to discharge the detained witness from  
2 custody.

3 As the Fifth Circuit stated In Aguilar-Ayala v. Ruiz, 973 F.2d  
4 411 (1992) at page 413:

5 Read together, Rule 15(a) and section 3144 provide a  
6 detained witness with a mechanism for securing his own  
7 release. He must file a "written motion", Fed. R. Crim.  
8 P. 15(a), requesting that he be deposed. The motion must  
9 demonstrate that his "testimony can adequately be secured  
10 by deposition" and that "further detention is not necessary  
11 to prevent a failure of justice" 18 U.S.C. section 3144.  
12 Upon such showing, the district court must order his  
13 deposition and prompt release. Id. ("No material witness  
14 may be detained" if he makes such a showing). Although  
15 Rule 15(a) is couched in the permissive "May" not the  
16 mandatory "shall", Fed R. Crim. P. 15(a) ("the court...may  
17 direct that the witness' deposition be taken"), it is  
18 clear from a conjunctive reading with section 3144 that  
19 the discretion to deny the motion is limited to those  
20 instances in which the deposition would not serve as an  
21 adequate substitute for the witness' live testimony: that  
22 a "failure of justice" would ensue were the witness  
23 released...absent a "failure of justice", the witness must  
be released.

24 Any ambiguity in Rule 15(a) was resolved when the statute was  
25 amended in 2002 to differentiate between motions for depositions  
brought by other parties as opposed to such motions brought by the  
material witness himself. The new statutory language holds that  
when a material witness files their own motion for a deposition,  
they do not even need to show any "exceptional circumstances" exist.  
The amended statute has already been upheld on appeal, United States  
v. Chen (N.D. Cal. 2003) 214 F.R.D. 578.

26 This is also the law in the Ninth Circuit as demonstrated by  
27 the case of Torres -Ruiz v. United States District Court for the  
Southern District of California, 97 CDOS 5335 (July 7, 1997). The  
court "agreed with the reasoning of [Aguilar-Ayala, supra]" and  
reversed Judge Huff who had denied a motion for a deposition on

1 facts virtually identical to the instant action . As the court  
2 stated:

3 In the instant case, two young men ages 19 and 22, have  
4 apparently been randomly selected out of a group of 27  
5 undocumented aliens and detained for a period of over 60  
6 days as material witnesses in a straightforward and  
7 uncomplicated alien smuggling prosecution. These young  
8 men state without opposition by either party to this case  
9 that they are the sole support for their respective  
families in Mexico, and that every day they remain in  
custody is a tremendous hardship on those family members.  
(Kilpatrick Declaration at 2) Neither petitioner is able  
to provide a surety for \$1000.00 bond. It is exactly  
circumstances such as these for which section 3144 appears  
to be designed.

Respectfully submitted,

LAW OFFICES OF THOMAS G. GILMORE

DATED: 4/3/08

By: /ss/ Thomas G. Gilmore  
Thomas G. Gilmore, Esq.  
Attorney for Material Witness

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